Suitability of accommodation

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Affordability

Art 2 Homelessness (Suitability of Accommodation) Order 1996, SI 1996/3204:

In determining whether it would be, or would have been, reasonable for a person to continue to occupy accommodation and in determining whether accommodation is suitable for a person there shall be taken into account whether or not the accommodation is affordable for that person and, in particular, the following matters-

(a) the financial resources available to that person, including, but not limited to,-
(i) salary, fees and other remuneration;

(ii) social security benefits;

(iii) payments due under a court order for the making of periodical payments to a spouse or a former spouse, or to, or for the benefit of, a child;

(iv) payments of child support maintenance due under the Child Support Act 1991;

(v) pensions;

(vi) contributions to the costs in respect of the accommodation which are or were made or which might reasonably be expected to be, or have been, made by other members of his household;

(vii) financial assistance towards the costs in respect of the accommodation, including loans, provided by a local authority, voluntary organisation or other body;

(viii) benefits derived from a policy of insurance;

(ix) savings and other capital sums;

(b) the costs in respect of the accommodation, including, but not limited to,-
(i) payments of, or by way of, rent;

(ii) payments in respect of a licence or permission to occupy the accommodation;

(iii) mortgage costs;

(iv) payments of, or by way of, service charges;

(v) mooring charges payable for a houseboat;

(vi) where the accommodation is a caravan or a mobile home, payments in respect of the site on which it stands;

(vii) the amount of council tax payable in respect of the accommodation;

(viii) payments by way of deposit or security in respect of the accommodation;

(ix) payments required by an accommodation agency;

(c) payments which that person is required to make under a court order for the making of periodical payments to a spouse or a former spouse, or to, or for the benefit of, a child and payments of child support maintenance required to be made under the Child Support Act 1991;

(d) that person's other reasonable living expenses.

See also paras 17.45 – 17.46 Homelessness Code of Guidance 2018.

Samuels v Birmingham City Council **[2019] UKSC 28, [2019] HLR 32**

Background

Ms Samuels, the appellant, was an assured shorthold tenant. She lived together with four children and her income consisted of housing benefit, child tax credit, child benefit and income support. However – like many occupiers in the private rented sector – her housing benefit award was not sufficient to cover her rent in full leaving her with a short fall of £151.49 per month which she had to meet from her other benefits.

Ms Samuels was unable to pay the shortfall consistently and over time rent arrears accrued and she was given notice to leave her accommodation. She then applied to Birmingham City Council, the respondent, as homeless. However, Birmingham concluded that she was not owed the main housing duty as she had become homeless intentionally. This decision was upheld on review with Birmingham reasoning that there was sufficient 'flexibility' in the amount of benefits Ms Samuels received for her to cover the shortfall. That decision was upheld on appeal to the county court and on a second appeal to the Court of Appeal.

The appeal to the Supreme Court

Ms Samuels appealed to the Supreme Court. Her grounds of appeal raised three issues:

1. The correct interpretation of paragraph 17.40 of the Homelessness Code of Guidance for Local Authorities (DCLG, 2006).
2. Whether accommodation can be regarded as affordable, and therefore reasonable to continue to occupy, where an applicant, after meeting their housing costs, would be left with a residual income less than the level of subsistence benefits (e.g. income support, child tax credit and housing benefit) to which he or she was entitled.

3. The quality of the reasons given in the decision.

The first of these grounds related to paragraph 17.40 of the code (which has since been superseded by the paragraph 17.46 of the 2018 code, which refers to Universal Credit) which provided that:

> 'In considering an applicant's residual income after meeting the costs of the accommodation, the Secretary of State recommends that housing authorities regard accommodation as not being affordable if the applicant would be left with a residual income which would be less than the level of income support or income-based jobseekers allowance that is applicable in respect of the applicant, or would be applicable if he or she was entitled to claim such benefit.'

Ms Samuels argued that this section of the code needed to be interpreted in the context of the rules on welfare benefits as they had existed at the time the guidance had first been drafted. Specifically, the guidance had been drafted at a time when income support included an award in respect of children, which had since been replaced by child tax credit. Child benefit also used to be factored into the calculation of an applicant's entitlement in a different manner to the modern regime. Therefore, the benchmark provided by the code – the level of income support – should be understood as referring to income support and child tax credit and child benefit. On a true interpretation of the code Ms Samuels argued, accommodation should not be regarded as affordable, if an applicant would be left with a residual income less than this after meeting housing costs.

The second ground sought to arrive at the same destination via a different route: the argument being that benefits such as income support and child tax credit were set at subsistence levels and were not intended to cover housing costs. Therefore, an applicant who is unable to afford his or her rent without dipping into those benefits, and thereby diverting resources away from their household's essential living needs, should not be found to have become homeless intentionally.

The third ground related to the scope and effect of Lord Neuberger's dicta in *Holmes-Moorhouse* [2009] UKHL 7, [2009] 1 WLR 413, to the effect that 'a benevolent approach should be adopted to the interpretation of review decisions'. See [50]. The Appellant challenged the invocation of this principle as a means to justify inadequate reasoning that did not substantively address the issues raised by an applicant's case.

The decision

In a unanimous judgment, the Supreme Court allowed the appeal. In relation to the interpretation of the code, Lord Carnwath (giving a judgment with which the other justices agreed) remarked at [33] that:

> 'There is an attraction in the argument that references to "income support" in paragraph 17.40 should be understood in the sense in which that expression was apparently used at the time of the earlier versions of the Code. It seems surprising, even nonsensical, that the level of income support should be maintained as a guide to affordability, but without regard to the changes which excluded from income support any allowance for the children of the family.'

However, it was not necessary of the court to determine this issue. Instead, the appropriate starting point was article 2 of the Homelessness (Suitability of Accommodation) Order 1996 which requires all sources of income which an applicant has, including welfare benefits, to be taken into account. The applicant's income should then be compared with his or her reasonable living expenses. The assessment of 'reasonable living expenses' was to be carried out objectively, and not based on the reviewing officer's subjective views of what was or was not reasonable, and on the basis that the applicant's accommodation would be available indefinitely. See [34].

Whatever the correct interpretation of the code, the reference to income support by way of a benchmark did not preclude the taking into account of child-related benefits in the assessment of affordability. Benefit levels were not 'generally designed to provide a surplus above subsistence needs for the family'. As such, benefit levels were 'at least a good starting point for assessing reasonable living expenses'. See [35].

The court held that the reviewing officer dealing with Ms Samuels' case had asked himself the wrong question: 'The question was not whether, faced with… [the shortfall of £151.49], she could somehow manage her finances to bridge the gap; but what were her reasonable living expenses (other than rent), that being determined having regard to both her needs and those of the children, including the promotion of their welfare.' Ms Samuels' living expenses, Lord Carnwath observed, were 'well within the amount regarded as appropriate by way of welfare benefits'. As such, 'in the absence of any other source of objective guidance on this issue it is difficult to see by what standard that level of expenses could be regarded as other than reasonable'. See [36].

The matter was remitted for reconsideration by Birmingham, but with the indication that it was 'hard to see on what basis the finding of intentional homelessness could be properly upheld', on the basis of the law as the court had explained it. See [37].

In view of the court's finding on the subsistence benefits issue, there was no need to consider the reasons challenge.

Discussion

The effect of the judgment, in practical terms is that – in the absence of any other source of objective guidance – local authorities should use the level of (non-housing related) welfare benefits to which an applicant is entitled as a benchmark for his or her reasonable expenditure, in assessing affordability. This is just a starting point however and any particular needs of children (for example) necessitating additional expense would still need to be factored in. For example, additional travel costs arising from a child's disability.

On the other hand, although the court did not say so expressly, we can probably assume that there may also be exceptional cases going in the other direction, in which an applicant has additional expenses which are *de minimis* and/or very short term, which he or she could reasonably be expected to adjust his or her expenditure to accommodate. That is, an applicant who is required to spend a couple of pounds extra for a few weeks to repay a small amount of rent arrears, might reasonably be expected to reduce expenditure elsewhere. His or her accommodation should not necessarily automatically be regarded as unaffordable simply because this temporary expense has pushed his or her normal expenditure over and above the welfare benefits benchmark.

This court's approach, as Lord Carnwath observed, reflects the fact that welfare benefits are set at a fairly austere level in order to meet a household's subsistence needs and no-more and are not intended to be sufficiently generous to cover other costs, such as housing, for which housing benefit is provided.

In addition, in basing their decision on this general principle, rather than on the interpretation of the 2006 code, the court has provided some general guidance on the approach to affordability which will continue to be of use now that that 2006 code has been superseded by the 2018 code. In relation to the 2018 code, in a post-script, the court noted that there was some ambiguity as to how the analogous paragraph (17.46) dealing with universal credit should be interpreted. See [40]:

'The government's consultation response dated February 2018 recorded a significant number of requests from "all stakeholder groups" for further guidance on assessing the affordability of accommodation, and that it had been decided to include "additional information on assessing affordability for a person based on Universal Credit standard allowances in chapter 17". The revised paragraph of the 2018 Code as issued reads:

> "17.46 Housing authorities will need to consider whether the applicant can afford the housing costs without being deprived of basic essentials such as food, clothing, heating, transport and other essentials specific to their circumstances. Housing costs should not be regarded as affordable if the applicant would be left with a residual income that is insufficient to meet these essential needs. *Housing authorities may be guided by Universal Credit standard allowances when assessing the income that an applicant will require to meet essential needs aside from housing costs*, but should ensure that the wishes, needs and circumstances of the applicant and their household are taken into account. ..." (Emphasis added)

It will be noted that this is no longer a recommendation but merely something which "may" be used as guidance; and that the suggested comparison is with Universal Credit "standard allowances". The court did not hear argument on whether this is limited to a "standard allowance" payable to adults or whether it includes amounts payable in respect of children.'

However, in view of the court's more general guidance, it may be that this ambiguity is academic.

In view of the ambiguity, together with the evidence of the interveners (CPAG and Shelter) as to the significant degree of variation in the assessment of affordability across the country which had existed to date, the court finished by urging the government to consider the issues raised by the judgment 'so that steps can be taken to address it and to give clearer guidance to authorities undertaking this very difficult task'. See [41]. But unless and until such guidance is produced the use of welfare benefits as a proxy for reasonable expenditure provides a consistent, workable, and objectively justifiable measure.

The issuing of such guidance will have to fall – as the court suggested – to central government, presumably by means of statutory guidance issued under s182 Housing Act 1996. It should not be left to local housing authorities to seek out their own sources of 'objective guidance'. The evidence

of the interveners suggested that a number of local housing authorities had – perhaps understandably – sought to do exactly that in the past, using a variety of financial assessment tools to evaluate an applicant's reasonable expenditure, some of which were more generous and objectively justifiable than others. It was this evidence, and the inconsistency it led to as between local housing authorities, that the court was referring when referring the matter for the attention of central government at [41].

The decision in *Samuels* is undoubtedly an important one, and the court's comment at [32] that it was not undertaking a 'general review of the law and policy in this field' should not be taken to suggest otherwise. If non-housing related welfare benefits are used as a proxy for reasonable expenditure, then there will be many people across the country facing a shortfall between their housing benefit and their rent, whose accommodation cannot properly be regarded as affordable and who may therefore be deemed to be statutorily homeless. This might perhaps be regarded as the inevitable consequence of a series of measures imposed by central government over the last decade such as the freeze to the local housing allowance, the bedroom tax and the benefit cap, which have reduced the level of benefits which are payable to meet housing costs. However, the practical impact of the decision should be kept in proportion. Realistically, the majority of those with a small shortfall between their housing benefits and their rent will not have any desire to apply as homeless. And those who do so can be assisted by means of modest discretionary payments to help them meet their rental costs as opposed to the provision of alternative accommodation. It is only in those cases in which the shortfall is significant and leads to eviction that the impact is likely to be significant. And effective early assistance from local housing authorities should hopefully mean that cases where matters progress this far are rare.

Benefit cap

How does this impact on the benefit cap and affordability? Various attempts to challenge aspects of the benefit cap on the grounds of discrimination have been dismissed by the Supreme Courts: *R (SG & others) v SSWP* [2015] 1 WLR 1449, SC and *R (DA & others) v SSWP* [2019] UKSC 21, [2019] 1 WLR 3289, SC.

The benefit cap results in reduction of housing benefit or the housing element of UC. In that respect, the remaining benefits are not affected. However, the shortfall between housing-related benefit and

rent must be paid from other subsistence benefits. And so the same analysis must apply: in order to pay the shortfall, will the applicant be deprived of basic essentials.

One first instance case accepted that the question of whether accommodation would be reasonable to continue to occupy once the applicant's housing benefit had been cut in accordance with the benefit cap had to be considered: *Magoury v Brent LBC* (2016) February Legal Action p46, County Court at Central London where the shortfall was to be £134 per week.

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